The appeal is allowed and the Collector's order set aside and it is ordered that the land be transmitted to the appellant. No order as to costs.

The matter now being in the hands of the Collector, he is entitled under section 4 (i) of Chapter 215 to endorse the title "Customary Land."

Appeal allowed.

[REVISIONAL CRIMINAL JURISDICTION]

HORNE, J.

August 17, 1940.

JEMIAH BINTI AWANG

v.

ABDUL RASHID BIN HAJI IBRAHIM.

[NEGRI SEMBILAN MISCELLANEOUS APPLICATION No. 10 of 1940]

[KUALA PILAH SUMMONS CASE No. 201 of 1940]

Maintenance—children of parents following the Adat—divorce of mother—father practising polygamy —whether children entitled to maintenance.

The rule that under the Adat a husband after divorce is not liable for the support of his children by his divorced wife does not apply where the husband is lawfully practising polygamy.

CRIMINAL REVISION.

The parties in person.

Horne, J.—In this matter the record has been called for under the provisions of section 323 of the Criminal Procedure Code. Both parties have appeared and have been heard.

The applicant summoned her husband, the respondent, before the Magistrate, Kuala Pilah, for an order for maintenance of her two children aged 4 and 9 years respectively. The Magistrate refused the application on the ground that there is a judgment of this Court (Registry N.S. 226/33) to the effect that under the *adat* after divorce a husband not being entitled to the custody of the children is not liable for their support.

That case is not very helpful. The evidence is sketchy, but apparently the mother had died and her sister (probably her customary heir), who was the complainant, had taken the four children aged 14, 12, 11 and 1½ years. The father, the respondent, appears not to have any other wife and had returned to live with his own female relations. He also owned land. It was held by Mudie, J. that as the respondent-defendant was not entitled under the *adat* to the custody, he was not liable for their support and the Magistrate's order for maintenance was set aside.

In another case, Registry N.S. No. 124/34, the father had been ordered to pay maintenance in respect of three children of his divorced wife who applied for their maintenance. The case was further enquired into on the order of Mudie, J. and it was established that the complainant and her late husband were members of tribes which followed the *adat*. The husband had not remarried. There had been a division of property on divorce. The Magistrate ordered maintenance, but the learned Judge set the order aside on the same grounds as in the earlier case.

In the case now before me the respondent and the appellant are both members of tribes which follow the rules of customary law to a degree which is not always easy to establish. The proceedings here are criminal in form, but whether an order can be made in such proceedings depends upon the civil rights of the parties.

The respondent is employed in the public service at a salary of $105.00 *per mensem*. His first wife is dead leaving one child. He admits before me he pays the school fees for that child. He then married the appellant and they had two children. He then married another female member of the same tribe paying the extra fee the custom demands. His case is that he is under the *adat* and having divorced his wife, she and her children go to their tribe, i.e. her female relatives, and he is not liable. As I understand the matter the *adat*, at least originally, permitted only monogamous marriages (Rembau History, *Parr and Mackray*, page 77 *et seq.*). But the respondent is a person who is lawfully practising polygamy, and as he cannot do so lawfully under the *adat*, I think it right to regard him as a person whose civil rights and duties in respect of wives and children fall to be dealt with under "the rules of the Muhammadan Law as varied by local custom."

One of the lembagas called before the Magistrate took the view that the children go to the mother and the father is not liable to maintain them. Such a rule appears to work well when there is ancestral property held by the mother or her near relatives. In this case it is alleged and not denied that neither the appellant nor her mother has any ancestral property and that the appellant and her children reside with her parents on the father's land.

The more senior lembaga (Dato Senara Muda) stated the custom similarly, but added that if the mother

cannot support the children they can be sent to the father who supports them and looks after them on condition that he cannot change their tribe.

The Kathi was also called and gave evidence that in his opinion under the *Hukum Shara* the mother had the custody until the children were ten and the father had to provide maintenance.

In this case the respondent did not establish before the Magistrate what were the terms of the custom on which he relied. And even if it is conceded that, under the *adat,* the rule is as given in the two cases cited, then as "*adat* is right action in the matters of every day life as well as in obedience of the law of the land" (Papers on Malay Subjects—Law—*Wilkinson,* page 14), right action or equity or justice would not permit it to be applied to this case where the facts are different. Also in this case the expert evidence is contradictory. The senior lembaga seems to realize the difficulty. As I understand his evidence he would give the husband custody though that appears contrary to the rule stated above and is contrary to Muhammadan Law and to the interest of the infant children. I think he meant that as the father was entitled to custody owing to the lack of property in the mother, the father ought in principle to maintain the children. But it involves even a good deal of reading between the lines of the evidence to reach that conclusion as to the meaning of his evidence.

I think in the circumstances of this case that as the respondent has married under the Muhammadan Law and has exercised the right of polygamy so given to him, he must, in the absence of proof of a custom varying that law, be bound by that law so far as it affects his duties to these children of the appellant.

For those reasons I set aside the Magistrate's order and made an order for maintenance.

Order for maintenance.

[APPELLATE CRIMINAL JURISDICTION]

HORNE, J.

September 30, 1940.

CHELLIAH v. PUBLIC PROSECUTOR.

[N.S. MAGISTRATE'S CRIMINAL APPEAL No. 32 of 1940]

Criminal Procedure Code, S. 261 (Proviso)—Change of Magistrate during hearing.

Where a case is partly heard before one Magistrate and adjourned and the hearing is resumed before another Magistrate, it is obligatory for the second Magistrate to recall witnesses if the accused asks for them.

MAGISTRATE'S CRIMINAL APPEAL.

Muttu-Ramalingam for Appellant.

Grattan-Bellew, Deputy Public Prosecutor, for Public Prosecutor (Respondent).

Horne, J.—The appellant was charged with using on the 2nd March, 1939, a motor car with inefficient brakes. On the 24th March, 1939, two prosecution witnesses were examined and an adjournment allowed to 31st March. On that day a further adjournment took place to 21st April and there is nothing on the record to show what happened on that day. The case was resumed by another Magistrate on the 26th January, 1940, when the advocate for the appellant asked the Magistrate to recall the witnesses for the prosecution. The *proviso* to section 261 of the Criminal Procedure Code which governs a change of Magistrate during a hearing is in these terms:—

> "(a) In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;"

In my opinion, such a word as "demand" makes it obligatory for the Magistrate to recall such witnesses if the accused asks for them and leaves no discretion to the Magistrate to act upon evidence partly recorded by his predecessor and partly by himself.

The conviction is quashed and the fine paid is to be returned.

I would add that the time elapsing between the offence viz. 2nd March 1939 and the conviction 30th January 1940, a period of almost eleven months, is an inexcusable delay having regard to the nature of the charge. Apparently the fault lies with the first Magistrate in granting an indefinite adjournment.

Conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]

HORNE, J.

September 30, 1940.

MURUGIAH v. PUBLIC PROSECUTOR.

[NEGRI SEMBILAN MAGISTRATE'S CRIMINAL APPEAL No. 34 of 1940]

Appeal—grounds of decision—necessity for stating reasons for believing or disbelieving evidence for prosecution or for accused—Criminal Procedure Code; S. 307 (iii); Theft—accused's explanation—sufficiency of.

In giving his "grounds of decision" under Section 307 (iii) of the Criminal Procedure Code, a Magistrate should state, except in the simplest of cases, the reasons why he believed or disbelieved the evidence given on behalf of the prosecution or of the accused, and not